

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

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x  
UNITED STATES OF AMERICA, : : Criminal Action  
: :  
Plaintiff, : : No. 2:14-cr-00264  
: :  
v. : : Date: January 5, 2015  
DENNIS P. FARRELL & : :  
GARY L. SOUTHERN, : :  
: :  
Defendants. : :  
x

PARTIAL TRANSCRIPT OF MOTIONS HEARING HELD  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government: AUSA PHILIP H. WRIGHT  
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Court Reporter: Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1                   PARTIAL PROCEEDINGS had before The Honorable Thomas E.  
2 Johnston, Judge, United States District Court, Southern District  
3 of West Virginia, in Charleston, West Virginia, on January 5,  
4 2014 at 1:32 p.m., as follows:

5                   COURTROOM DEPUTY CLERK: The matter before the Court is  
6 the United States versus Dennis Farrell, et al., criminal action  
7 number 2:14-cr-00264, scheduled for a motions hearing.

8                   THE COURT: Good afternoon. Will counsel please note  
9 their appearances?

10                  MR. WRIGHT: Good afternoon, Your Honor. Philip  
11 Wright, Larry Ellis, and Eric Bacaj on behalf of the United  
12 States.

13                  MR. ALLEN: Good afternoon, Your Honor. Robert B.  
14 Allen, Mr. Billy Wilkins, Mr. Mark Moore, and both of them are  
15 with Nexsen Pruet from Charleston, Columbia, and Greenville,  
16 South Carolina. At counsel table is Mr. Southern. We also have  
17 with us Ms. Deem, and Sam Marsh left the courtroom for a few  
18 minutes, but he will be back, on behalf of Mr. Southern.

19                  MR. CAREY: Good afternoon, Your Honor. Mike Carey and  
20 Ben Bryant on behalf of defendant, Mr. Farrell, who is here in  
21 person.

22                  THE COURT: All right. Good afternoon. I set this  
23 matter, matter of the motions to disqualify today, earlier on  
24 because I see it as a potential threshold issue and I thought it  
25 was best to address it as soon as possible.

1           Let's -- let's start out with a couple of preliminary  
2 matters. First of all, let's talk about -- let me get a preview  
3 of what we're going to get today. As I read through the briefing  
4 on this, it looked to me like it was mostly -- we were mostly  
5 talking about a discussion of legal issues and it didn't look to  
6 me like there would be a tremendous amount of disputed factual  
7 matters. Are we intending to -- are we expecting this to be a  
8 factually disputed hearing or are we going to mostly be talking  
9 about legal issues?

10           MR. ALLEN: Your Honor, I think we're probably talking  
11 mostly about legal issues due to the United States'  
12 representation that recusal in this district is unprecedented and  
13 there's no history or no precedent of any recusals in this  
14 district.

15           We have subpoenaed two individuals, Judge King and Warren  
16 Upton, a former United States Attorney, who you are familiar  
17 with, on prior recusals and, if the judge would like to hear  
18 their testimony, or we can make representations to the Court  
19 regarding those recusals.

20           There are two, in particular, the FMC one, and then one was  
21 Truman Chaffin. Truman Chaffin occurred under Rebecca Betts when  
22 she was U. S. Attorney; and then the one for FMC was when Judge  
23 King was the United States Attorney. They've been subpoenaed.  
24 They're available.

25           I did -- there was a Motion to Quash and a Motion in Limine

1       with regard to Judge King, but they're under subpoena and they  
2       are available, if the judge would like to hear from them. The  
3       rest of them, I think, are pretty much legal issues.

4                     THE COURT: Well, my thought was that, rather than  
5       spend a lot of time on presenting evidence today, that perhaps we  
6       could proceed by proffer with regard to the facts because, again,  
7       as I look at it, I doubt that there are many facts involved here  
8       that are going to be particularly disputed.

9                     Does anybody have any objection to proceeding by proffer, at  
10       least until that becomes -- if and when that becomes a problem?

11                    MR. ALLEN: No objection on behalf Mr. Southern.

12                    MR. CAREY: No objection at this time, Your Honor,  
13       subject to reservation on how it proceeds and may make a request  
14       to supplement the record, at some point.

15                    MR. WRIGHT: Your Honor, if the proffer is going to  
16       involve a revelation of information that is confidential and that  
17       was not disclosed publicly about prior recusals in this office,  
18       then I object to even a proffer. It's irrelevant and I think the  
19       revelation and use of the information by an attorney against and  
20       to the disadvantage of a former client is a violation of Rule  
21       1.9(c) of the Rules of Professional Conduct, as well as a  
22       violation of the West Virginia Rules of Professional Conduct.  
23       So, if we're going to talk about a proffer relating to recusals  
24       that happened over 35 years ago, then we object to that.

25                    In terms of whether it's relevant or not, we believe it's

1       irrelevant. The argument about whether or not a recusal is  
2       unprecedented in this district, Your Honor, is about whether the  
3       defendant, under the guise of the due process clause, or  
4       fairness, or impartiality, or whatever standard they think  
5       applies can be used to recuse an entire United States Attorney's  
6       Office over the objection of the Department of Justice. That  
7       would be unprecedented. And the fact that the department, where  
8       some other matter involved the recusal on the Rules of  
9       Professional Conduct or circumstances that are not pertinent here  
10      is irrelevant and should not be brought forth.

11            MR. ALLEN: They're the ones that said it's  
12       unprecedented to have a recusal in the Southern District of West  
13       Virginia, Judge, and we're prepared to address that, and I don't  
14       think -- I don't think they're probably going to dispute -- I  
15       don't see how they can dispute the fact that there was a recusal  
16       of the United States Attorney's Office in the Truman Chaffin  
17       case, as well as the FMC case, and I think Mr. Moore has some  
18       information with regard to a third situation that existed here in  
19       the Southern District of West Virginia and, in fact, worked with  
20       Mr. Ellis.

21            MR. WRIGHT: And, Your Honor, that information is  
22       confidential. That information is not public and the use of it  
23       in revelation here right now seriously implicates Rule 1.9.

24            THE COURT: All right. I'm a little bit concerned  
25       about this discussion that we're getting into here, so I think

1 I'm going to ask counsel and their clients, at least one counsel  
2 per party, maybe we'll try to keep it to one counsel per party,  
3 because I can only accommodate so much of a crowd up here. I  
4 think we need to talk about this at the bench, but the parties  
5 need to be up here.

6 MR. ALLEN: Your Honor, Mr. Mark Moore would represent  
7 Mr. Southern in this conference since he has more background  
8 information regarding this recusal.

9 THE COURT: All right. Fair enough.

10 (At side-bar).

11 THE COURT: All right. I'm a little concerned about  
12 all of this because, first of all, I'm asking myself, well, okay,  
13 maybe it's happened before, maybe it hasn't. Why is that really  
14 relevant here?

15 I know that the government has made a representation it's  
16 unprecedented. I'm a former U. S. Attorney, too. I have some  
17 sense of when these things happen and when they don't. I don't  
18 know how, to what extent this is, whether or not it's happened  
19 before is really going to play that much of a role in my decision  
20 in this matter. So, and I also -- maybe I'm remembering -- for  
21 example, this Truman Chaffin thing, how far back does that go?

22 MR. MOORE: That was 1995, as I understand it, Your  
23 Honor. I have a number of cases which I am prepared to discuss  
24 which are recusals in various districts, and I brought Pacer  
25 printouts with me that indicate that there was an attorney from

1       someone other than the United States Attorney's Office in that  
2       district who handled the case.

3           I am also -- a lot of those cases are cases that I know a  
4       good bit about because I was Assistant U. S. Attorney and a  
5       supervisory Assistant United States Attorney in the District of  
6       South Carolina, and I also handled a number of recusal cases for  
7       the department. One of those recusal cases was a matter which  
8       was pending in this district and it was a case where there was a  
9       conflict. The U. S. Attorney's Office referred that matter to  
10      General Counsel.

11           I was brought in. I ultimately -- I later determined, after  
12      the United States Attorney left the office -- I later determined,  
13      after the United States Attorney left the office, that there was  
14      no conflict and the case went back to that office. I'm assuming  
15      that's the case that they don't want me to talk about.

16           THE COURT: You know, I have my own experiences as U.  
17       S. Attorney. I was recused in two -- at least two cases, maybe  
18       three, that I can think of. I know the process. I'm familiar  
19       with all of this.

20           MR. MOORE: Yes, sir.

21           THE COURT: I'm just trying to decide to what extent I  
22       really need to delve into this. It seems to me this matter is  
23       going to either rise or fall on its own merits as opposed to  
24       other cases that may be factually distinct from this, so why  
25       should we get into this at all?

1                   MR. MOORE: One of those cases involves a case where  
2 the acting United States Attorney in South Carolina was a victim.

3                   THE COURT: Is that a -- is that a case where something  
4 -- there's something I can use as a precedent? Is there  
5 something out there with a record on that? I mean, do you have a  
6 decision of a court on that?

7                   MR. MOORE: I don't have a decision of a court on it  
8 because, as Your Honor knows from your time as U. S. Attorney,  
9 usually what happens is the United States Attorney's Office  
10 reports the conflict to General Counsel and General Counsel takes  
11 care of it behind the scenes and handles the recusals themselves.

12                  One of our concerns in this case is that we have not gotten  
13 an answer and this office raised the issue with General Counsel,  
14 as the U. S. Attorney's Manual requires them to do.

15                  THE COURT: That's a different issue. In fact, I have  
16 questions about that because, when I was U. S. Attorney, I viewed  
17 the Office of General Counsel as my lawyer. So it seems to me  
18 there's a question there as to whether or not that sort of thing  
19 is privileged.

20                  MR. MOORE: I understand the substance of the  
21 communication is privileged. We're asking questions about  
22 whether there was communication, period, not the substance of the  
23 communication.

24                  THE COURT: I'm not so sure that that answers the  
25 question, but I'm just sitting here questioning whether we need

1 to dig into this because of my familiarity with the Justice  
2 Department and its practices and policies and the U. S.  
3 Attorney's Manual and the fact that, even if, in the history of  
4 the Republic, it's never happened before, if I think it's  
5 appropriate, I'll do it. That's not to say that I am going to  
6 find it appropriate.

7 MR. ALLEN: I understand, Your Honor.

8 THE COURT: But I could -- well, whether or not there's  
9 a precedent for this, if there's an otherwise legal basis for it,  
10 I could really care less. So, my question is, do we really need  
11 to dive into this?

12 MR. WRIGHT: May I speak?

13 THE COURT: You may.

14 MR. WRIGHT: Your Honor, that is exactly our position.  
15 We don't dispute that this office has on occasion been recused on  
16 certain matters that are not relevant here. We believe, as the  
17 Court pointed out, that the merits of a recusal issue in this  
18 case shall rise and fall on the facts as they pertain here, and  
19 not something that happened in 1995, and not something that  
20 happened in 1978.

21 Mr. Moore, I've met him today -- I'm assuming this is Mr.  
22 Moore -- and we talk about matters that occurred and -- that  
23 occurred, I think he said, on the inside, I forgot the exact  
24 wording he used, but internal information to the Department of  
25 Justice. That's the basis for our Motion to Quash beyond the

1       irrelevancy of it, but also, the Motion in Limine. He cannot  
2       ethically reveal inside information about a former client to the  
3       disadvantage of that former client. The former client is the  
4       United States. We stand here representing the United States. I  
5       am objecting now to Mr. Moore's attempt to use inside information  
6       to the disadvantage of a former client and to even reveal it.  
7       That's what we're saying is under Rule 1.9.

8               Beyond that, Your Honor, all of this is irrelevant. I think  
9       we should go to the legal arguments. And I can cut this off, as  
10       far as the U. S. Attorney's Manual. I am not allowed to disclose  
11       confidential information or confidential communications.

12              I have been authorized to states this. We have consulted  
13       with the appropriate officials in Washington with the Department  
14       of Justice. We have complied with the requirements of the U. S.  
15       Attorney's Manual. This office continues to represent the United  
16       States in this case and there will not be a recusal from the  
17       Department of Justice forthcoming in this case.

18              THE COURT: Well, I think what I'm going to do is,  
19       because I haven't had a chance to look at this and it sounds like  
20       the further we talk about it, the more the issues we get, I'm not  
21       going to get into this today, but I will give you all an  
22       opportunity to convince me to get into this at another time.  
23       There's too much here for me to delve into and I'm completely  
24       unfamiliar for me to make a decision. So, we're not going to get  
25       into this today, but you may convince me to get into it another

1 time.

2 MR. MOORE: Yes, sir.

3 THE COURT: Now, while we're here, this is a matter of  
4 curiosity, as anything. When I was at the United States  
5 Attorney's Office, there was a U. S. Department -- the guy was  
6 David Margolis. Is he still there or is he retired?

7 MR. WRIGHT: I think he's still there, Your Honor.

8 MR. MOORE: He's still there.

9 THE COURT: So my question for you is, has this not --  
10 has this been run by him?

11 MR. WRIGHT: None of our officials there have talked --  
12 now whether or not they've talked to him -- but we have not  
13 talked to him.

14 MR. MOORE: One of our questions would be, when did  
15 this communication occur? Did it occur pre- or post-indictment?  
16 Did it -- did they not consult until after we raised the issue?

17 THE COURT: Well, I think that falls in the category of  
18 what I'm uncomfortable getting into.

19 MR. MOORE: I understand.

20 THE COURT: I'd be very curious. I know David  
21 Margolis, and there are very few people in the public service I  
22 have a greater regard for than David Margolis, and this is  
23 something, if I was U. S. Attorney, I would have talked to David  
24 Margolis about. Now there's nothing in the U. S. Attorney's  
25 Manual that says, "I shall talk to David Margolis."

1 MR. ALLEN: Right.

2 THE COURT: But anybody with the U. S. Department of  
3 Justice knows what his role is, and I'm not saying that there was  
4 anything that said you had to talk to him, but if you had talked  
5 to him, I would have been interested to see what he had to say  
6 about it because I think a lot of his opinion, but we don't have  
7 that, so we're going to move on. We'll leave this issue for  
8 another day.

9 MR. MOORE: All right. I understand, Your Honor.

10 (Side-bar concludes.)

11 THE COURT: All right. Just to make the conclusion of  
12 our discussion a matter of -- open to the public, we're going to  
13 defer those issues for another day.

14 (Further proceedings held thereafter.)

15

16

17 CERTIFICATION:

18 I, Ayme A. Cochran, Official Court Reporter, certify that  
19 the foregoing is a correct transcript from the record of  
20 proceedings in the matter of United States of America, Plaintiff  
21 v. Dennis P. Farrell & Gary L. Southern, Defendants, Criminal  
22 Action No. 2:14-cr-00264, as reported on January 5, 2015.

23

24 s/Ayme A. Cochran, RMR, CRR

January 9, 2015

25

Ayme A. Cochran, RMR, CRR

DATE